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NO. 479

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

EDWARD EARLE BECK, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI
To The United States Court of Appeals
For the Fifth Circuit

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INDEX

	Page
Opinion Below	1
Jurisdiction	2
Questions Presented	2
Constitutional and Statutory Provisions Involved	3
Statement of the Case:	
I. The Arrest	5
II. The Trial	6
III. The Post-Trial Denouement	8
Reasons for Granting the Writ	13
Conclusion	19
Certificate of Service	19
Appendix "A" (Opinion of the Court of Appeals)	20
Appendix "B" (Judgment of the Court of Appeals)	33
Appendix "C" (Order denying rehearing)	34
Appendix "D" (Letter announcing denial of reconsideration of Order denying rehearing)	35
Appendix "E" (Letter exchanged by lawyers representing the principal prosecution witness)	36

AUTHORITIES

Cases

	Page
CONSTITUTIONAL PROVISIONS	
Fifth Amendment	2, 3
Sixth Amendment	2, 4
STATUTES	
21 USC 176(a)	1, 6
26 USC 4744(a) (2)	6
26 USC 7237(d)	6
28 USC 2106	4, 18
JUDICIAL OPINIONS	
Alcorta v. Texas, 355 U.S. 28	14
Alford v. United States, 282 U.S. 687	14
Ashley v. Texas, 319 F.2d 80	16
Avery v. Georgia, 345 U.S. 559	14
Berger v. United States, 295 U.S. 78	17
Farkas v. United States, 2 F. 2d 644	14
Gordon v. United States, 344 U.S. 414	14, 16
Jencks v. United States, 353 U.S. 657	17
Lynumn v. Illinois, ____ U.S. ____, 9 L. Ed. 922, 83 S.Ct. 917	15
Meeks v. United States, 163 F.2d 598	16
Mesarosh v. United States, 352 U.S. 1	3, 18
Poller v. Columbia Broadcasting System, 368 U.S. 464	17
Stevens v. People, 245 Ill. 593, 74 N.E. 786	14
United States v. Dye, 221 F.2d 763	13
United States v. Shotwell Mfg. Co., 355 U.S. 233	3, 13, 18

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Edward Earle Beck prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit affirming his conviction for smuggling in violation of 21 U.S.C. 176(a).

OPINION BELOW

The District Court for the Southern District of Texas did not render an opinion. The opinion of the Court of Appeals is reported at 317 F. 2d 865 and is reproduced as Appendix "A" to this petition.

JURISDICTION

The opinion (R. 535; Appendix "A") and judgment (R. 549; Appendix "B") of the Court of Appeals are dated May 30, 1963. A petition for rehearing (R. 550) and motion for leave to file supplemental record (R. 560) were denied by *per curiam* order (R. 603; Appendix "C") on July 22, 1963. A motion for reconsideration of these decisions was denied July 30, 1963 (Appendix "D"), on which date Mr. Justice Black enlarged the time for filing this Petition to and including September 20, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner enjoyed the Fifth Amendment's due process of law or the jury trial contemplated by the Sixth Amendment (including the right to have the credibility of the principal prosecution witness evaluated by the jury, rather than the judge or prosecutor) when:

a. A key prosecution witness has herself pleaded guilty to the very offense for which petitioner is being prosecuted as a principal and her credibility as a witness may depend on the jury's belief that she herself is actually guilty;

b. The witness testifies that she does not intend to withdraw her plea of guilty;

c. The judge instructs the jury that he meticulously satisfied himself of her guilt before accepting her plea;

d. But the judge has already held at least one personal conference with the witness which leads to his approval of the withdrawal of her plea of guilty and to ultimate dismissal of all charges against her, after petitioner's conviction on the basis of her testimony?

2. Whether the due process clause of the Fifth Amendment, or the federal government's general obligation to conduct fair criminal trials, imposes an affirmative duty on the judge, the prosecutor, the probation officers, or other public officials to reveal to the defendant the true and complete status of clemency negotiations with a witness who has pleaded guilty and remains unsentenced while testifying, or at least an obligation not to remain silent when such information becomes material in impeaching the witness?

3. Whether a United States District Judge has a duty to reveal information within his personal knowledge to the defense in a criminal case, when his prior participation in the case makes him a witness to facts having a material bearing on the credibility of the principal prosecution witness, and when these facts do not appear of record?

4. Whether the Court of Appeals erred, under the unusual circumstances which came to light in this case only after the record on appeal was designated by the parties, in refusing to order either a reversal of petitioner's conviction or a fact-finding hearing to prevent a judgment based on "tainted testimony" or a "corrupt record" within the meaning of this Court's opinions in *Mesarosh v. United States*, 352 U.S. 1, and *United States v. Shotwell Mfg. Co.*, 355 U.S. 233?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law; . . ."

The Sixth Amendment to the United States Constitution provides in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . ."

Section 2106, Title 28, United States Code, provides:

> "The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree or order, or require such further proceedings to be had as may be just under the circumstances."

STATEMENT OF THE CASE

As we explain below; the facts which are material to the questions presented became known only after the record on appeal to the Fifth Circuit was designated. Although these facts were presented to the Court of Appeals, that Court refused to allow its clerk to incorporate some of the evidence in the record which he certified to this Court (R. 603, Appendices "C" and "D"). The clerk has furnished us with a supplemental certificate, which we have filed with the record, incorporating this additional material. In this petition, page references to the certified record are preceded by the letter "R" and page references to the supplemental certificate are preceded by the letter "C".

I.

The Arrest

Petitioner, a hairdresser (R. 57, 119, 434), went to Mexico with a woman named Janet Watkins for a weekend in August, 1961, to see the bullfights (R. 97), driving with a couple named Jan and Frank Taylor (R. 103). On their return to the United States, customs inspectors made a "thorough search" (R. 139, 237) of Janet Watkins and found five marijuana cigarettes "done up on top of her head in a roll off of her neck", with 15 seconal capsules and 41 benzedrine tablets (R. 64, 140-145, 239-240).

The petitioner denied "ownership or connection" with the marijuana cigarettes and told a customs inspector that "he didn't know nothing about it" (R. 77). He said that "he didn't know where they came from or how they got there" (R. 154) and "denied any knowledge of the marijuana" when he was first questioned by Customs Inspector King (R. 300). Janet Watkins told King that she herself had purchased the marijuana and other drugs and that only she had anything to do with it (R. 187-188, 463).

On the other hand, Beck told Janet Watkins that he would "take care of it" (R. 74), that he "had taken the blame" (R. 156), and later did indeed tell Inspector King that he "placed the marijuana in her hair without her knowledge" (R. 300-301). Before the U.S. Commissioner, Beck "took all the blame" (R. 160, 303). He had been discussing marriage with Janet Watkins at the time this offense was committed (R. 160, 201, 458).

II.

The Trial

Beck and the Watkins woman were jointly indicted (R. 508-509) for smuggling the marijuana, in violation of 21 U.S.C. 176(a), and for transporting it without paying the federal transfer tax, in violation of 26 U.S.C. 4744(a)(2). Janet Watkins pleaded guilty to the tax count only; pursuant to a bargain with her lawyers the prosecutor dismissed the smuggling count against her, and her sentencing was deferred (R. 586, 592, 599-600). By statute, a defendant convicted of the smuggling count must be sentenced to the penitentiary for a mandatory five-year minimum term, without possibility of suspended sentence, probation or parole (26 U.S.C. 7237(d)), benefits available to Janet Watkins if convicted only of the tax count.

Beck pleaded not guilty to both counts of the indictment (R. 11). His first trial, in December of 1961, at which Janet Watkins testified for the government (C. 125-180), ended in a mistrial (R. 32, 587-588) because of a hung jury (C. 370). Janet Watkins also testified (R. 94-231, 442-464) for the government at the second trial, in February of 1962 (R. 17). This time, Beck was convicted (R. 503, 519) and sentenced to six years confinement on the smuggling count (R. 507, 524), the judge having entered judgment of acquittal on the tax count (R. 468, 524).

Beck's culpability and the credibility of Janet Watkins were bitterly disputed.[1] Summarizing the evidence for the

[1] Janet Watkins testified that she had never been to Nuevo Laredo before (R. 104); Frank Taylor said that she told him she had lived there and knew several people there (R. 365); and that

jury, the trial judge pointed out that "someone" acquired the marijuana, that the contraband was found in Janet Watkins' hair, and then stated: "From that point on, I think almost everything in the evidence is disputed by one witness or the other." (R. 481-482).

Testifying about her own plea of guilty, Janet Watkins gave these answers to these questions (R. 180-181):

"Q. . . . that plea is still in effect, isn't it?
A. Yes, sir.
Q. The plea of guilty? You have never, either directly personally or through an attorney, undertaken to withdraw or change that plea, have you?
A. No, sir.
Q. And you don't intend to now, do you?
A. No, sir.

The trial judge emphasized Janet Watkins' acknowledgment of her own guilt by including the following statement in his charge to the jury (R. 484), describing her plea of guilty:

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she directed them to the store where the pills were purchased (R. 369). Watkins said she saw the others smoking marijuana (R. 112-116); Taylor denied this (R. 384). Watkins swore the petitioner arranged her hair with the Taylors present (R. 119-121); Taylor denied this and testified that petitioner had no opportunity to do so (R. 385-386). Watkins said she had never seen marijuana before (R. 114), that she had never even smoked a cigarette (R. 117-118), and that she could not put up her own hair (R. 185, 203); a prostitute who worked with Janet Watkins as a call girl (R. 331-332) had seen Watkins smoke a marijuana cigarette (R. 338) and had seen Watkins put up her own hair (R. 336-337), as had Taylor (R. 364) and the petitioner's mother, with whom Janet Watkins once lived (R. 434). Watkins told the customs inspectors she was a "cosmetician when employed" just after her arrest (R. 463).

"The evidence further shows that at that time, I asked her if she had put the marijuana in her hair, and she said she had not, and I then asker her, having some uncertainty as to the propriety of the plea of guilty, if she denied having put it there. I asked her if she knew it was there, and she stated to me that she did, whereupon I accepted her plea of guilty."

III.

The Post-Trial Denouement

Designation of the record on appeal was completed by the parties on April 23, 1962 (R. 3, 5, 564) and the appeal was argued on October 11, 1962 (R. 534). On May 13, 1963—just seventeen days before the Court of Appeals returned its opinion affirming petitioner's conviction—petitioner's counsel learned for the first time (R. 562) that all charges against Janet Watkins were dismissed after Beck's conviction.

On the very day the record was designated for the appeal—but just after designation of the record (R. 564)—Janet Watkins filed a motion to withdraw her plea of guilty on the footing that it was "entered improvidently, and without understanding . . . of the nature of the charge, the effect of the plea, or her rights in the premises . . ." (R. 565). The motion was signed (R. 565) by one of the two lawyers who represented (R. 179-180) the Watkins woman when she entered her plea of guilty and to whom, she claimed at this trial (R. 192-193), she told "the truth." The motion was endorsed "Unopposed" by the Assistant U. S. Attorney who prosecuted this petitioner (R. 566) and was granted (R. 565-566) by the same District Judge who assured the jury that Janet Watkins admitted to him in open court that she knew the marijuana was in her hair (R. 484).

The case against Janet Watkins was dismissed on June 28, 1962 (R. 567-568), on motion of the government.

But the Court of Appeals—like the trial jury—did not know of these developments, because the record and docket sheet presented to it (R. 4-5) necessarily terminated with the final designation of the record on appeal. The record compelled the Court of Appeals to find that, "The evidence as to the knowledge of Janet Watkins was not proved by one or two isolated questions seeking to impeach her, but there was much evidence." (R. 545; 317 F. 2d at 871).

Dismissal of the charges against the government's witness was brought to the attention of the Court of Appeals by Petition for Rehearing (R. 550-559) and Motion for Leave to File Supplemental Record (R. 560-568). The government then filed *ex parte* statements (only one of which is under oath), establishing the following:

(1) Even prior to the date on which she committed herself by pleading guilty (September 25, 1961; R. 586, 600), neither of Janet Watkins' lawyers thought that a judge or jury would consider her to be a credible witness if she denied knowing that the marijuana was in her hair. One lawyer certified that "either a jury or a judge . . . probably would not believe her story" and that "in my view, it was doubtful that a jury would believe her statement that she did not know the cigarettes had been placed in her hair." (R. 585). The other lawyer said: "I thought it very unlikely that a jury would believe her in this respect." (R. 599)

2. The lawyers representing Janet Watkins told her that "she would probably escape prison time by entering a plea

to the tax count" (R. 585-586) and that "if she pled (sic) guilty to the tax count, she had an opportunity to obtain a lesser sentence, with suspension or probation in whole or in part. . ." (R. 599)

3. The government entered into and abided by a bargain to dismiss the charge involving mandatory jail time in exchange for a plea of guilty. The Assistant U. S. Attorney admitted that, "I had agreed that the government would dismiss count one of the indictment if she entered a plea to the tax count." (R. 592) Both lawyers representing Janet Watkins specifically and independently verified this bargain before permitting her to enter a plea of guilty (R. 586, 599-600).

4. After she pleaded guilty to "knowingly and willfully" smuggling the marijuana (R. 193), but even before this petitioner was tried the first time (R. 587), Janet Watkins asserted her own innocence to the probation officers, the very assertion which her lawyers said would not be believed in court (R. 585, 599). The facts she recounted to the probation officers "indicated her to be innocent of the offense" and "the probation officers had in turn taken Janet Watkins to Judge Connally who had also talked to her. From my talks with the probation officers," one of her lawyers said (R. 587) in a statement solicited and filed by the prosecution, "I concluded that both they and the judge had a doubt as to her guilt."

5. "Janet Watkins testified for the government at the first trial, and in her testimony she stated that she had not known that the marijuana was in her hair. (R. 593)." In spite of her testimony and her conferences with the probation officers and the trial judge, "During the 60 day period between the first and second Beck trials nothing

occurred with regard to Janet Watkins' case" (R. 593) except that both of her lawyers also discussed her case with the district judge (R. 587-588, 601).

6. When the Assistant United States Attorney sought permission from the Department of Justice to dismiss the case against Janet Watkins, he represented that petitioner secreted the marijuana in her hair "unknown to Watkins" (R. 582) and assured the Department that "she has maintained this story throughout . . ." (R. 583) Addressing the Court of Appeals, which had access to the records of trial, this same prosecutor said (R. 572):

> "Janet Watkins' story of this whole transaction varied from time to time between her arrest and her testimony. Some of the variations in her testimony could have made the difference between her innocence and her guilt."

Likewise, the application for authority to dismiss the indictment represented to the Department of Justice that Janet Watkins "is naive" (sic) (R. 583), but the government's brief in the Fifth Circuit contended (R. 553, 576) that, "These are not the activities of a naive, inexperienced young lady!"

The government's last *ex parte* statements were filed at the clerk's office in New Orleans on July 17, 1963 (R. 596), a Wednesday. On the following Saturday, July 20, petitioner's counsel mailed (C. 35), a reply brief (C. 22-35) containing controverting information (C. 26) to the clerk, who did not receive it until Tuesday, July 23 (C. 22), the day after the Court of Appeals denied a rehearing (R. 603). The controverting information was a letter

from one of Janet Watkins' lawyers to the other which is reproduced as Appendix "F" to this petition. This letter, written on November 29, 1961, before Beck's first trial, establishes:

1. Janet Watkins met with a probation officer after pleading guilty.

2. The probation officer believed that she was a "victim of circumstances."

3. The probation officer "was able to have a conference with Judge Connally concerning the matter, who in turn had a conference with Janet personally."

4. The prosecutor and probably the judge were "also convinced that Janet is a victim of circumstances and not guilty."

5. "The present course of action is as follows: Janet will be a witness for the government against Mr. Beck. After she testifies against him, Janet will withdraw her plea of guilty to not guilty, and the case will be tried before the court if tried at all. Although the Government has not promised anything, they have as much as indicated her cases will be dismissed."

Upon learning that the Court of Appeals had denied the petition for rehearing while petitioner's answer to the government's pleading was in the mail, petitioner filed a motion for reconsideration of the petition for rehearing (C. 3-21), which was denied by a letter from the clerk notifying counsel that the Court refused to allow the letter described above "to become a part of the record on appeal." (Appendix "D" to this petition; C. 2) Even though the government's last pleadings had been filed

only a few days earlier, the Fifth Circuit Rules do not protect a party against the possibility that a petition for rehearing will be denied while he is obtaining evidence to contradict his adversary's pleadings (C. 1, par. "D").

REASONS FOR GRANTING THE WRIT

Like *United States v. Shotwell Mfg. Co.*, 355 U.S. 233, "This case presents an unusual question involving the integrity of a criminal trial in the federal courts" which is not fully reflected by the record in the courts below.

A writ of certiorari should issue for the following reasons:

1. Standards of propriety for federal officials dealing with unsentenced defendants who are expected to testify against others as prosecution witnesses have not yet been—but should be—established by this court. The facts admitted in the certificates filed by the government in this case demonstrate that this decisional vacuum results in practices which effectively prevent juries from reaching informed evaluations of the credibility of such witnesses, thus curtailing the Sixth Amendment right to have such determinations made by a jury—"the only tribunal entitled to pass upon it. . ." *United States v. Dye*, 3 Cir., 221 F. 2d 763, 767.

2. The fact that the trial judge specifically instructed the jury that he satisfied himself that the witness was guilty when he accepted her plea (R. 484), without mentioning that she (R. 587) and her lawyers (R. 587-588, 601) had already personally conferred with him to advance their theory that she is actually innocent, is such a departure from fundamental standards of fairness as to call for the exercise of this court's supervisory powers over

inferior federal tribunals. When Watkins' sworn claim that she had never undertaken to withdraw her plea and did not intend to do so (R. 180-181) is coupled with the fact that she was allowed to withdraw her plea (R. 565-566) as soon as the record on appeal was designated (R. 564), it is apparent that this jury was given the kind of "false impression" which amounts to a denial of due process of law. *Alcorta v. Texas*, 355 U.S. 28, 31.

"The mind of justice, not merely its eyes, would have to be blind to attribute such an occurrence to mere fortuity," as Mr. Justice Frankfurter said in *Avery v. Georgia*, 345 U.S. 559, 564.

Vast experience in jury trials is not needed to appreciate the significance of the practices employed in this case. The "hope or expectation" in "the mind of the witness" that "he would be favored in the case pending against himself" is a vital factor to a juror who must decide whether the witness is telling the truth. *Stevens v. People*, 215 Ill. 593, 74 N.E. 786, 789. This court has reversed at least two criminal convictions because cross-examination about such prospects was curtailed by the trial judge. *Alford v. United States*, 282 U.S. 687, 693; *Gordon v. United States*, 344 U.S. 414, 422-424. The question in these cases is not whether the judge or prosecutor made promises to the witness, but whether there is "anything else that would throw light upon the prosecuting witnesses' state of mind . . . even if it be fully conceded that he had not the slightest basis from any act or word of the district attorney for such a belief or hope." *Farkas v. United States*, 6 Cir., 2 F. 2d 644, 647.

To present a witness to a jury as an admitted accomplice who has pleaded guilty, when the witness and her lawyers are actually pursuing a course of action calculated to convince the authorities that she is innocent, is to deprive the jury of crucial information. When "almost everything in the evidence is disputed by one witness or the other", as the judge told this jury (R. 481-482), any evidence bearing on credibility assumes enormous importance, particularly when there is also testimony that the witness wants to secure her freedom because "she didn't want to lose her children." (R. 342) See *Lynumn v. Illinois*, ____ U.S. ____, 9 L. ed. 2d 922, 83 S. Ct. 917, in which this court recognized the inherently coercive effect of such a possibility, a consideration which a jury might certainly be expected to appreciate.

In this case, two lawyers representing the witness had concluded that no jury would believe her if she claimed to be innocent (R. 585, 599) and had communicated this "advice" to the district judge before the trial which is now under review (R. 587-588). But a jury *must* believe Janet Watkins in order to convict Beck, because it was the Watkins woman who testified that Beck arranged her hair in Mexico. (R. 119-121).

The Beck jury had an absolute right to conclude that Beck's admissions were nothing more than an attempt to "take the blame" (R. 156, 160) for a woman he wanted to marry (R. 160, 201, 458). The jury was entitled to apply the maxim "falsus in uno, falsus in omnibus" and to discard as unworthy of belief everything Janet Watkins said if she insisted on her own innocence—precisely the result which her lawyers predicted if she submitted her

own case to a jury. Instead, however, she was allowed to tell a "credible" story:

(a) a story in which she shared the guilt;

(b) a story which portrayed her as ready to accept appropriate punishment for her own misconduct;

(c) a story which was shattered irrevocably, within instants after the record to be seen by the appellate courts was designated by the parties, when the trial judge permitted her to withdraw her guilty plea and the government dismissed the case against her.

By whatever means this strange result came about, these facts should be presented to a jury at a new trial so that a jury, rather than the judge or prosecutors, may decide whether this woman is telling the truth.

Although, "It is difficult to imagine a more direct and intimate relationship likely to affect one's testimony than that between the plaintiff government and its most important witness. . ." (*Meeks v. United States*, 9 Cir., 163 F. 2d 598, 599), one such relationship is that of the judge with "a prisoner whose plea of guilty put him in large measure in the hands of the speaker." *Gordon v. United States, supra*, 344 U.S. 414, 422. At least in *Gordon* a transcript existed with which the witness could be impeached.

Passive non-disclosure of evidence favorable to a defendant "amounts to such fundamental unfairness in the trial of a criminal case as to amount to a denial of due process" (*Ashley v. Texas*, 5 Cir., 319 F. 2d 80, 85) when such evidence is known to the prosecution. It would certainly

appear that judges who hold these *ex parte* meetings with prosecution witnesses should be under an even greater affirmative duty to disclose material facts within their knowledge in order to discharge their own obligation to "a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88. As this court knows, "only the defense is adequately equipped to determine the effective use (of such information) for purpose of discrediting the Government's witness and thereby furthering the accused's defense. . ." *Jencks v. United States*, 353 U.S. 657, 668-669.

Certainly this conviction should not be permitted to become final on this record, as it exists today. The sequence of events alone suggests that material evidence was not disclosed to the jury in this very close case—so close that the first jury was unable to agree upon a verdict (C. 370). Just as "(t)rial by affidavit is no substitute for trial by jury" (*Powell v. Columbia Broadcasting System*, 368 U.S. 464, 473), the *ex parte* exculpatory statements solicited and filed by the government are no substitute for a hearing at which petitioner may enjoy a right

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[2] In one context or another, such conferences are increasingly creating problems in the administration of criminal justice. See **United States v. LaVallee**, 2 Cir., 319 F. 2d 308, presenting the typical situation in which only one defendant is involved and he is the person claiming to be aggrieved. New considerations arise when there are multiple defendants and the interests of those who will plead not guilty may be directly affected as in this case, by favored treatment of those who will testify for the government. Minimal standards of fairness would seem to require that these meetings be held in open court (where they may be reported) or that other defendants be advised of the substance of these conversations for use in impeachment.

to cross-examine and to call witnesses of his own, as ordered by this court in *United States v. Shotwell Mfg. Co.*, 355 U.S. 233, and as requested by the government in *Mesarosh v. United States*, 352 U.S. 1.

However the participants may now describe events which took place two years ago, one of Janet Watkins' lawyers was certain enough of her position to tell her other lawyer in an unequivocal, contemporaneous letter written before this petitioner was tried, that the prosecutor "is also convinced that Janet is a victim of circumstances and not guilty" and that "Janet will be a witness for the Government against Mr. Beck. After she testifies against him, Janet will withdraw her plea of guilty to not guilty. . ." (C. 12, 26; Appendix "E" to this petition.)

That letter alone should establish probable cause for further judicial inquiry before the petitioner is sent to the penitentiary on the basis of this record. This court (like the Court of Appeals) has statutory authority (28 USC 2106) to "require such further proceedings, to be had as may be just under the circumstances." We believe that the facts already admitted in the government's certificates, in and of themselves, not only require a new trial but demonstrate a very real need for a definitive opinion from the Supreme Court discussing and establishing standards of conduct which will reveal, rather than conceal, the true nature of considerations present in the minds of prosecution witnesses who themselves are subject to prosecution.

However, if this court does not wish to decide these questions without the benefit of an opinion from the Court of Appeals, we submit that it would be appropriate

and certainly necessary in the interests of justice to this petitioner to grant a writ of certiorari, to reverse the *per curiam* opinion (R. 603; Appendix "C") denying a rehearing, and to remand the case to the Court of Appeals with instructions to order an evidentiary hearing before a different district judge and to reconsider the case on the basis of the facts established at that hearing, subject to further discretionary review by this court.

CONCLUSION

For the reasons stated, a writ of certiorari should issue to review the judgment of the Court of Appeals for the Fifth Circuit in this case.

Respectfully submitted,

WILLIAM F. WALSH
1955 Richmond Avenue
Houston, Texas 77006
Counsel for Petitioner

CERTIFICATE OF SERVICE

I certify that copies of the above and foregoing petition were mailed to the Solicitor General, Department of Justice, Washington 25, D. C., air mail postage prepaid, and to William A. Jackson, Assistant United States Attorney, United States Court House, Houston, Texas, first-class postage prepaid, this 17th day of September, 1963.

William F. Walsh, Esq.

APPENDIX "A"

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 19,562

EDWARD EARLE BECK, *Appellant*

versus

UNITED STATES OF AMERICA, *Appellee*

Appeal from the United States District Court for the Southern District of Texas

(May 30, 1963)

Before HUTCHESON, WISDOM and GEWIN, Circuit Judges.

GEWIN, Circuit Judge: Edward Earle Beck, appellant, was convicted by a jury of a violation of 21 U.S.C.A. 176 (a). The substance of the offense was the smuggling of five marihuana cigarettes into the United States from Mexico at the Laredo International Bridge. The marihuana was hidden in the elaborate hairdo of his travelling companion, Janet Watkins.

Beck and Janet Watkins, together with another couple, went to Mexico for a weekend. When the parties entered the United States upon their return, an initial inspection

revealed no contraband; but Janet Watkins was taken into a search room by a female inspector and subjected to a thorough search. The inspectress found five marihuana cigarettes "done up on top of her head in a roll off her neck", with a quantity of seconal and benzedrine tablets.

Beck was tried along for the offense; Janet Watkins having previously plead guilty to "knowingly" smuggling the cigarettes into the United States. At the trial of this case, Janet Watkins, a chief witness for the prosecution, testified in answer to some questions that she did not know the marihuana was in her hair; but in answer to other questions she admitted having knowledge of its presence. When the search was made, Beck told the customs officer that Janet Watkins had no knowledge of the marihuana in her hair and that he had placed it there without her knowledge. At his trial, he claimed that Janet Watkins and placed the marihuana in her hair and that he had no knowledge of the existence of the narcotic.

In summary, Beck specifies the following four errors which he claims are sufficient to reverse his conviction: (1) That his character was attacked improperly upon the direct examination of Janet Watkins, when in response to the prosecutor's question, she testified that Beck was a pimp, panderer, or procurer, in view of the fact that the defense did not attempt to establish Beck's good character nor did he take the witness stand; (2) The trial court erred in submitting the case to the jury on the theory that Beck and Janet Watkins were acting in concert with each other; whereas, Janet Watkins herself denied that she knew anything about the presence of marihuana in her hair, and therefore she and the defendant could not have acted in concert with respect thereto; (3) Since the evidence will

only support a conviction of Beck upon the theory that he *caused* Janet Watkins to violate the law, the trial judge erred in refusing to instruct the jury that he must have wilfully caused such violation as provided by Title 18 U.S.C.A. § 2(b);[1] (4) It was error for the court to refuse to allow the defense to prove that cosmeticians receive 500 hours of training in hairdressing, in view of the peculiar and unique significance of hair styling in this case.

During the Government's direct examination of Janet Watkins,[2] an effort was made to prove that the defendant Beck had undertaken to persuade her to become a prostitute; it being contended that such a course of conduct would ". . . show the similarity of this type of action . . .", that is, similarity in using her to smuggle marihuana, and using her in the business of prostitution. The inquiry related to whether or not Beck and the witness Watkins had a discussion ". . . as to a means of raising . . . money?". At this point in the trial the court sustained the defendant's objection. On cross-examination the defense made rather strong insinuations concerning the character, veracity and conduct of the witness Watkins, making full inquiry as to her background, her employment, where she worked, her association with others, and similar matters.[3] The defense also undertook to impeach the witness Watkins on numerous grounds, interrogating her as to her knowledge of and use of marihuana, whether she had been to Mexico on prior occasions, her association with the defendant Beck, whether she knew of the location of a certain store in Mexico,

[1] Title 18 U.S.C.A. § 2(b) provides:
"Whoever causes an act to be done, which if directly performed by him would be an offense against the United States, is also a principal and punishable as such."

[2] The witness Watkins had also been known as Mrs. Adriano.

[3] The following is from the record:

her ability to arrange her hair as it was arranged when the marihuana was discovered, and whether she realized that she had plead guilty to "knowingly and wilfully" having possession of marihuana." The cross-examination by the defense as to the activities of the witness Watkins rather

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"Q. All right. Then you had been there at that time whatever length of time you had lived at Cherie's on LaBranch, is that correct?"
"A. Yes, sir.
"Q. What was Cherie's other name
"A. Cherie — I don't — her last name I don't know.
"Q. Did you ever know it?
"A. I think it was Cherie Parker. She was from Corpus Christi.
"Q. Did you know her in Corpus?
"A. Yes. I met her through a girlfriend of mine.
"Q. Just state if you knew her. Mrs. Adriano, while you were living at Cherie's, did you have any employment?
"A. No, sir. I was looking for a job.
"Q. Will you tell the jury how many hundreds of dollars you sent back to Corpus —
"A. None.
"Q — in July the month of July 1961?"
"A. None.
"Q. Not any?
"A. No, sir."

The trial judge commented as follows:

"I think it is admissible at this stage of the proceedings. I am aware of the fact that I excluded it when this witness testified first. My reason for doing so was, I thought the point which you are now making at that posture, was probably well taken. Since the witness has left the stand, however, the defense has injected this question of her good character, of her working as a prostitute, of the fact that the witness Collins had a discussion or an inspection of this witness while she was staying at the address which is shown to be the same as the Taylors' house, she has been impeached in any number of particulars, and in my judgment, in rebuttal, she is entitled to show that her only connection with this type of work was through the defendant and through the Taylors, and also to show her relationship with the defendant, in explanation of her own testimony. In other words, having been impeached, she is entitled to show the whole story.

clearly related to the matter of her being a prostitute.' On redirect examination the Government asked the witness if she had ever engaged in prostitution. The court permit-

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"I will instruct the jury that the defendant is not on trial for any offense except those in the indictment, and they will not consider this other than in so far as it has to do with the credibility of this witness."

"Q. I direct your attention to a date along about the 25th or 26th at the end of August, 1967, to a telephone call from one Dottie Youngblood. Did you receive a call from that madame to fill a date at a given address in an area of Houston known as Sin City?

"A. No, sir.

"Q. Did you or not take a taxicab to that place, and find there two men — to any place there and find there two men waiting for two girls?

"MR. JACKSON: Just a minute, Your Honor, we object to this line of questioning. Mr. Foreman can come out and ask the question, of course, for impeachment as to any conviction she might have for a felony, but to go all around the thing and attempt to, by innuendo and so forth, the question has no materiality and it is certainly not a proper question for impeachment purposes.

"MR. FOREMAN: I am not attempting to impeach her. I am attempting to lay a predicate for impeachment.

"THE COURT: I am prepared to rule on it without further argument.

I think you may prove, if you can, that this young lady has used marijuana, because she has denied it, but in the event you prove she has used it, I think it would furnish some motive for the offense. I don't think you may attempt, in the guise of showing she may have smoked marihuana, to leave these inferences you are undertaking to leave, and I would sustain an objection to that part of the question.

"MR. FOREMAN: I don't think I am undertaking to leave any inferences, but I think I owe it to the Court, in laying a predicate for impeachment, to fix the time, place, and the occasion.

"THE COURT: All right, sir.

"Q. Do you know a prostitute in Houston whose real name is Dorothy Crim, but whose professional name is Vicki Collins?

"A. I know her from here.

"Q. Did you see her at an apartment off San Felipe around the 1500 block, in an area sometimes called Sin City, on a night in late August?

"A. No sir.

"Q. Around the 25th, 6th or 7th?

"A. The 26th of August I was on my way to Corpus Christi.

"Q. And when did you come back from Corpus Christi?

"A. The following week.

"Q. All right. Before you went to Corpus Christi, and late in August, did you see Vicki Collins at an apartment in the southwest area of Houston?

"A. No, sir.

"Q. Off San Felipe? Did you on that occasion fix not only her hair, but your own hair?

"Now you may go forward."

ted her to answer, but refused to permit the Government to ask her whether she had ever been requested by any person to engage in prostitution."

As one of its witnesses, the defense called Dorothy Crim, who testified to a number of facts which directly conflicted with the testimony of Janet Watkins. Dorothy Crim claimed that she had seen Janet Watkins arrange her own hair in the style in which it was arranged when the marihuana was found and that she had seen her smoke a marihuana cigarette. The examination of Miss Crim went much farther. In substance she testified that she once worked with Janet Watkins as a prostitute. She further outlined the fact that ". . . the Madame that I worked for had sent me over to see what she looked like, and to talk to her, and see if she could use her on calls." She stated that the LaRivera Club where Janet Watkins had worked was a place where prostitutes made their dates; that she and Miss Watkins went to an apartment off San Felipe Drive in Houston known as "Sin City" to meet two "customers"; and that the Madame received forty percent of the call girl's earnings. The defense, in its brief, asserts that it is important

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"A. No, sir.
"Q. After or just before leaving the apartment?
"A. No, sir.
"Q. Did you or not, on that occasion, receive thirty dollars from Vicki Collins?
"A. No, sir.

"THE COURT: Ladies and gentlemen of the jury, I want to give you this instruction. A few moments ago, I permitted this witness to testify over objection that she was not a prostitute and never worked as such, and had not associated with prostitutes,' words essentially to that effect.

"The question was then put to her whether anyone had asked her or suggested that she work in that capacity. I think the question is improper; there is no need to pursue that question any further. You ladies and gentlemen please will not consider the question as meaning anything. Disregard it, if you please."

to appreciate the fact that the defense never endeavored to impeach Miss Watkins by proving she was a prostitute. It is difficult to see how such an assertion can be made or that the testimony offered by the defense could have any other effect. The trial judge gained a different impression of the evidence, and we strongly suspect the jury gained the same impression as the trial court.

After all of the foregoing transpired, the Government was permitted to recall Janet Watkins, and after prolonged argument and discussion, the court permitted the following questions:

> "Q. Have you ever been requested to go into that business [prostitution] by any person?
> "A. Yes, sir.
> "Q. And who was that person?
> "A. Eddie Beck."

Beck strenuously contends that this evidence was inadmissible; being wholly unconnected with the crime charged and that it could have no other effect upon the jury than to prejudice them against him.

The case of Bracey v. United States, D. C. Cir., 1944, 142 F. 2d 85, is somewhat similar to the case at bar. In that case the defendant was charged with carnally knowing and abusing a twelve year old girl. The defendant's step-daughter was a witness against him. The defense attempted to impeach her testimony by proving that the little girl did not like her step-father. On recross-examination, the girl was allowed to explain that the reason she disliked the defendant was the fact that he had committed a similar crime against her. The Court said in conjunction with the admissibility of this evidence.

> "When, however, the impeachment of a witness is conducted in such manner as itself to confuse the jury concerning the existence of bias, or of its character if bias does exist, and thus to mislead the jury concerning the veracity and dependability of the witness, then the trial judge may properly permit an explanation to be made."

The rule applies logically not only when a witness is impeached because of bias, but also when bad character is used to impeach a witness. As stated in *United States v. Boyer*, D. C. Cir., 1945, 150 F. 2d 595, the Court said:

> "Whether the witness is or is not a defendant, if the opposing party introduces his previous convictions we think the witness should be allowed to make such reasonably brief protestations on his own behalf as he may feel able to make with a due regard to the penalties of perjury."

When the defense opened up the question of Janet Watkins' character by attempting to prove that she was a prostitute, the prosecution was properly allowed to counteract that evidence or rehabilitate the witness, even if in doing so the evidence offered made the defendant appear as an unsavory character. As held in *United States v. Novick*, 2 Cir., 1941, 124 F. 2d 107:

> "And if the evidence was proper rebuttal, the fact that incidentally it implied an illegal act on appellant's part would not bar it."

The extent to which counteracting and rehabilitative evidence may be received after the credibility of a witness has been attacked is a matter in which a trial judge has broad discretion. We hold that the trial judge did not abuse his discretion in this case. There was no unfair advantage

to the prosecution and no unfair surprise to the defense. *Bank of America National Trust & Sav. Ass'n. v. Rocco*, 3 Cir., 1957, 241 F. 2d 455.

In addition, the trial court gave a thorough cautionary charge to the jury to the effect that the evidence offered was not received to cast any reflection on the character of Beck, but only incidental to the credibility of Janet Watkins. This charge was approved in *Abrens v. United States*, 5 Cir., 1959, 265 F. 2d 514. We do not approve an unbridled attack upon the defendant's character in a situation in which a witness has been impeached. In the circumstances of this case, since the witness had been attacked by a showing that she was a prostitute, rebuttal testimony was entirely proper to show that her only connection with that type of activity was through Beck, and to show her relationship with Beck in explanation of her testimony.

In his second specification of error the appellant contends that the trial court erred in submitting the case to the jury on the theory that the defendant could be convicted if the jury believed he aided, abetted, counseled, commanded, induced or procured the commission of the offense by Janet Watkins as provided by Title 18 U.S.C.A. § 2(a).* *Grant v. United States*, 9 Cir. 1961, 291 F. 2d 746. It is contended that knowledge on the part of Janet Watkins of the presence of the marihuana in her hair is necessary proof to support such a theory. It is claimed that the only such evidence was developed by the appellant on cross-examination when she admitted that she entered a plea of guilty to "knowingly and wilfully" smuggling the contraband. Such

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*Title 18 U.S.C.A. § 2(a) is as follows:

"Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces or procures its commission, is a princip[illegible]

evidence, it is contended, was only for impeachment and could not be otherwise used, and certainly it could not be used to prove that Beck aided or abetted Janet Watkins. The defendant relies on *Grant v. United States*, 9 Cir., 1961, 291 F. 2d 746. We cannot agree with this contention. There was ample evidence in the record to show a close relationship between Janet Watkins and the defendant. She stated that he influenced her to move to Houston from Corpus Christi; that he arranged for her to live with his mother; he obtained a room for her at the Taylor residence; he discussed marriage with her; she shared the same motel room with him on the trip to Mexico; she plead guilty to "wilfully and knowingly" transporting marihuana arising out of the same transaction, and such plea was entered in the same court; and he proved that she was a prostitute, according to the evidence of witness Crim. In addition, there was evidence that Beck was in possession of marihuana before returning to the United States; that he smoked it; that Janet Watkins admitted having the marihuana in her hair and the witness Crim testified that she was thoroughly capable of arranging her hair in the fashion in which it was arranged when the marihuana was found. Beck takes a rather strange position. In the trial court he sought an acquittal by carefully and cautiously proving full knowledge of the presence of the marihuana on the part of Janet Watkins, but here he contends that since she had no knowledge of its presence, Beck could not be guilty of aiding and abetting her in the commission of the offense. The evidence as to the knowledge of Janet Watkins was not proved by one or two isolated questions seeking to impeach her, but there was much evidence. We find nothing in the case of *New York Life Ins. v. Bacalis*, 5 Cir., 1938, 94 F. 2d 200, a civil case, to support the appellant's argument. In that case

hearsay evidence was admitted for the sole purpose of impeachment and was not admitted as substantive evidence. The court clearly charged the jury as to this aspect of the case:

> "In the event you should find that Beck knew of Miss Watkins' intention to bring the marihuana back, but if he did not in any sense participate in her smuggling of the marihuana, if he did not aid, abet, counsel, command or induce her to do so; if it was her act, and he had knowledge but did not aid, abet, command or induce her to do it, and simply sat by and said nothing, then Beck should be acquitted, because the mere fact that he knew the law was being violated would not make him guilty."

Beck next contends that when the trial judge charged the jury on the theory that he was guilty under 18 U.S.C.A. 2(b), that is, that he caused Janet Watkins to transport the marihuana into this country, that he did not include the word "wilfully" in his charge, which is an ingredient of the offense. This contention arises from the court's following charge:

> "Whoever causes an act to be done which, if directly performed by him, would be an offense aginst the United States, is also a principal punishable as such . . . if he caused that act of smuggling to be done, he would likewise be guilty with Miss Watkins. . . ."

At the beginning of the charge, the trial court read the indictment which charged Beck with "knowingly and wilfully" smuggling marihuana into the United States. He then read to them 21 U.S.C.A. 176(a), which requires a

"knowing" intent on the part of an accused. Immediately thereafter the court charged further.

> "The defendant is charged with performing this act knowingly. Knowingly, of course, simply means that it was done with knowledge, that it was done deliberately, as to be distinguished from an act which was done accidentally or inadvertently."

The charge throughout contained references to the necessity of a finding of intent for a conviction. The charge must be looked upon as a whole in order to determine if an issue is fairly presented to the jury. *Legatos v. United States*, 9 Cir., 1955, 222 F. 2d 678; *Windisch v. United States*, 5 Cir., 1961, 295 F. 2d 531. We hold that the charge as a whole fairly presents the issue of wilfullness to the jury and is not subject to the infirmities claimed.

In a further effort to prove knowledge on the part of Janet Watkins, it was the defense's contention throughout the trial that Janet Watkins had put the marihuana in her hair as she rolled it up; but she denied that she could or did do so. The testimony showed that when Janet Watkins crossed the border, she listed her occupation as "cosmetician when employed". The defense sought to prove that a cosmetician is required to have at least 500 hours training in hairdressing to become licensed. The trial judge excluded this proffered evidence as irrelevant, and Beck claims this was error. There was never any contention in the trial that Janet Watkins was a licensed cosmetician, as opposed to a non-licensed one. There was ample evidence in the case from which the jury could have drawn the conclusion that she could roll up her own hair. There was direct testimony to that effect. At best, the receipt of the offered evidence was discretionary with the trial judge, it

was cummulative, and its exclusion was not prejudicial error.

The defense of the appellant was skillfully conducted in the trial court by experienced counsel. Our examination of the record convinces us that he received a fair and impartial trial. Cases of this nature do not always run smooth and it is often true that witnesses on both sides make conflicting statements. Such was true in the trial of this case. We are impressed with the following forthright statements from the appellant's brief:

> "We are not, of course, suggesting that this Court should weigh the evidence; we are not appealing this conviction on the sufficiency of the evidence to sustain a conviction as a matter of law."
>
> * * * *
>
> "We concede, *in the light of this relationship between the parties*, that the Appellant has made many contradictory statements concerning the marihuana found in Janet Watkins' hair, some of which would authorize conviction and some of which would indicate that he is innocent." (emphasis added).

The appellant does not claim serious errors in the trial, but we cannot agree.

The judgment of conviction is

AFFIRMED.

A true copy
Test: EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals, Fifth Circuit
By: ?? ?? ? ?
New Orleans, Louisiana, July 31, 1963

APPENDIX "B"

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

October Term 1962

No. 19,562

D. C. Docket No. 18138 Crim. Laredo Division

EDWARD EARLE BECK, *Appellant*

versus

UNITED STATES OF AMERICA, *Appellee*.

Appeal from the United States District Court for the Southern District of Texas

---

Before HUTCHESON, WISDOM and GEWIN, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by the Court that the judgment of conviction of the said District Court in this cause be, and the same is hereby, affirmed.

May 30, 1963

Issued as Mandate:

APPENDIX "C"

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 19,562

EDWARD EARLE BECK, *Appellant*

versus

UNITED STATES OF AMERICA, *Appellee*

Appeal from the United States District Court for the Southern District of Texas

---

On Motion for Leave to File Supplemental Petition and On Petition for Rehearing

---

(July 22, 1963)

Before HUTCHESON, WISDOM and GEWIN, Circuit Judges.

PER CURIAM:

Upon consideration of the petition for rehearing and of the motion for leave to file supplemental record in support thereof, and of the answer of the United States with exhibits to the motion for leave to file and to the petition for rehearing, and it appearing that the motion for leave to file supplemental record is without sub-

stance, it is ORDERED: that the motion for leave to file supplemental record be, and it is hereby, DENIED; and that the petition for rehearing also be, and it is hereby DENIED.

APPENDIX "D"

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

Edward W. Wadsworth
Clerk

Post Office Box 30120
New Orleans 30, La.

Office of the Clerk
July 30, 1963

Mr. William F. Walsh
Attorney at Law
1955 Richmond Avenue
Houston 6, Texas

Re: No. 19562 - Edward Earle Beck vs. United States of America

Dear Mr. Walsh:

In connection with your motion for reconsideration, and alternatively for stay of mandate, I am directed to advise that the Court will not permit the filing of your motion for reconsideration, as in the nature of a second petition for rehearing, nor will it entertain the second petition or permit it to become a part of the record on appeal. However, I enclose our usual form of order granting your alternative motion for a 30-day stay from July 22, 1963, in order to enable you to petition the Supreme Court for a writ of certiorari. I am also enclosing three extra copies of this letter, for your use, if needed, in attaching same as an appendix to your petition

for writ of certiorari, since no formal order was entered by the Court on your motion for reconsideration.

Very truly yours,
EDWARD W. WADSWORTH,
E. W. Wadsworth.
Clerk

encs.
cc and enc.:
Mr. William A. Jackson
Mr. Morton L. Susman

APPENDIX "E"

November 29, 1961

Mr. Stanley Freed
Attorney at Law
P. O. Box 298
Laredo, Texas

RE: U. S. v. Janet Watkins
Criminal No. 18138
U. S. District Court, Southern District of Texas

Dear Stan:

Since Janet pled guilty she has had a conference with Hugh Johnson, Probation Officer, who believes that she was a victim of circumstances the same as you and I beleive. After conferring with the Probation Officer he was able to have a conference with Judge Connally concerning the matter, who, in turn, had a conference with Janet personally. It is my understanding, although not confirmed, that Judge Connally is of the same opinion as we are. After conferring

with Judge Connally we were able to talk to Bill Jackson of the Federal District Attorney's office, who is also convinced that Janet is a victim of circumstances and not guilty.

The present course of action is as follows: Janet will be a witness for the Government against Mr. Beck. After she testifies against him, Janet will withdraw her plea of guilty to not guilty, and the cases will be tried before the court if tried at all. Although the Government has not promised anything, they have as much as indicated her cases will be dismissed. Janet is in the process of paying us money which will be sent to you as soon as she is able to raise the $50.00. At the present time I intend to come to Laredo. We likely will not have to appear until around December 6.

Sincerely yours,
DIXIE & SCHULMAN

By:
Jack J. Rawitscher

JJR:evs

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Rule involved	2
Statement	3
Argument	11
Conclusion	13

CITATIONS

Statutes:

18 U.S.C. 2	7
21 U.S.C. 176	3
26 U.S.C. 4744(a)(2)	3

Miscellaneous:

Federal Rules of Criminal Procedure, Rule 33	2, 11, 13

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 479

EDWARD EARLE BECK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A; R. 535-548) is reported at 317 F. 2d 865.

JURISDICTION

The judgment of the court of appeals was entered on May 30, 1963 (Pet. App. B; R. 549). A petition for rehearing was denied on July 22, 1963 (Pet. App. C; R. 603). On July 30, 1963, Mr. Justice Black

extended the time for filing a petition for a writ of certiorari to and including September 20, 1963, and the petition was filed on September 18, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, where no motion for a new trial had been made in the district court, the court of appeals erred in declining, on petition for rehearing, to reverse petitioner's conviction or to order an inquiry upon petitioner's allegations that newly discovered evidence showed that he had been denied a fair trial.

RULE INVOLVED

Rule 33 of the Federal Rules of Criminal Procedure provides:

> The court may grant a new trial to a defendant if required in the interest of justice. If trial was by the court without a jury the court may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 5 days after verdict or finding of guilty, or within such further time as the court may fix during the 5-day period.

STATEMENT

In the United States District Court for the Southern District of Texas, petitioner and one Janet Watkins were charged with smuggling marihuana cigarettes into the United States from Mexico in violation of 21 U.S.C. 176 and with transporting the marihuana without having paid a transfer tax in violation of 26 U.S.C. 4744(a)(2). Petitioner went to trial alone before a jury and was convicted on the smuggling count in February 1962.[1] He was sentenced to imprisonment for a term of six years (R. 524).

1. The evidence at trial may be summarized as follows:

Petitioner and Janet Watkins, together with another couple, were returning to the United States from a week-end trip to Mexico when they were stopped at the Laredo International Bridge and searched by customs officials. An inspectress found, rolled in the elaborately-styled bouffant coiffure of Janet Watkins, five marihuana cigarettes and a quantity of seconal and benzedrine tablets (R. 238-239). Miss Watkins at first denied knowledge of the presence of these objects in her hair, explaining that petitioner (who was a professional hair-dresser) had combed her hair that morning (R. 152). Shortly thereafter she changed her story to say that she had combed her own hair (R. 153). At this time peti-

[1] A first trial had in December 1961 ended in a mistrial because of a hung jury.

tioner denied tha he had any knowledge of the marihuana in the girl's hair. An hour later, however, he called the investigators aside and told them he had placed the marihuana in the girl's hair that morning without her knowledge (R. 300-301), saying, "She doesn't know anything about this, she is a good kid, she wouldn't know marihuana if she saw it. It's mine, I don't—I can't let her take the rap" (R. 309-310). Petitioner named a known marihuana peddler in Nuevo Laredo, Mexico, as the person from whom he had bought ten cigarettes (R. 301).

Both petitioner and Miss Watkins were arrested (R. 298). At a Commissioner's hearing petitioner repeated his story that the marihuana was his and that he had placed it in the girl's hair without her knowledge (R. 303).

At the time of petitioner's trial, Janet Watkins had entered a plea of guilty to the tax count of the indictment. She testified on direct examination, however, that on the morning of the day she was arrested petitioner had combed her hair in the motel room they had shared. She said it was not unusual for him to arrange her hair, that there was no mirror, that she was not watching him, and the marihuana was not hers (R. 119, 145). She explained that she had falsely admitted to custom officials that she had combed her own hair after petitioner had denied complicity and it appeared that she was going to be charged anyway (R. 153-155).

On cross-examination, defense counsel asked Miss Watkins if she had been represented by counsel "at the time you entered a plea of guilty in this court-

room to the possession of marihuana, meaning these same five marihuana cigarettes that you now say you know nothing about * * *." The witness answered in the affirmative (R. 180).[2] Counsel then drew from her the admission that the plea was still in effect, that she had never undertaken to withdraw it, and that she did not intend to do so (R. 180-181). When he asked her if she pleaded guilty because she was guilty, the witness answered "Yes and No" (R. 181). She said, "I imported them, but I didn't know that I had them" (R. 189). Counsel then read to her the count of indictment charging smuggling "knowingly" and "wilfully." She conceded that this was what she had pleaded guilty to, that she had told the court that she understood it fully, and had conferred with counsel with respect to it (R. 191-192).[3] Asked if she knew what she was doing when she so assured the court, she answered "No Sir" (R. 192). Under continuous questioning she said the plea was entered "Because I am guilty" and when asked if she was "knowingly and wilfully" guilty, she answered "Yes, Sir" (R. 193). Minutes there-

[2] In his opening statement to the jury, defense counsel said that he intended to prove that Janet Watkins fixed her own hair on the morning of her arrest; that she was an habitual user of barbiturates and marihuana; that she admitted to customs agents that the marihuana was hers; that she had entered a plea of guilty after consultation with counsel; that at no time had she requested to withdraw the plea of guilty and that "up to now" it had not been withdrawn; that her admission exculpated others (R. 49-51).

[3] This was not the count to which Miss Watkins had entered the plea of guilty.

after she repeated her assertions that petitioner arranged her hair, that she could not see what he was doing, and that she only told the customs officers that she arranged her hair because "They wouldn't believe me when I was telling the truth" (R. 208, 218-219).

The court instructed, *inter alia*, that, in view of the fact that Miss Watkins had entered a plea of guilty to the offense upon which she and petitioner were jointly charged, the jury should give her testimony careful scrutiny and examination (R. 473). With regard to her plea the court said (R. 483-484):

> * * * the evidence and the records of this Court show in September Miss Watkins, being charged with this offense, having counsel of her own choice, stood here at this Bar and entered a plea of guilty. The evidence further shows that at the time, I asked her if she had put the marihuana in her hair, and she said she had not, and I then asked her, having some uncertainty as to the propriety of the plea of guilty, if she denied having put it there. I asked her if she knew it was there, and she stated to me that she did, whereupon I accepted her plea of guilty.

The court also noted that the defense had offered much evidence to discredit Miss Watkins, that her testimony had been impeached in many particulars, and that by her own admissions she had told differing versions of the matter. He instructed that this and other evidence must be considered in determining her credibility (R. 485).

The jury was further instructed that it could convict petitioner if it believed that he had acted alone

in placing the marihuana in the girl's hair without her knowledge or if it believed he had aided and abetted her in committing the offense.

2. On appeal the petitioner urged reversible error in the trial court's evidentiary rulings and in its instructions, including the direction that petitioner could be convicted if the jury found that he aided and abetted the commission of the offense by Janet Watkins within the meaning of 18 U.S.C. 2. The argument was made that knowledge on the part of Janet Watkins of the presence of marihuana in her hair was necessary proof to support such a theory and that there was no such proof. On May 30, 1963, the court of appeals affirmed the conviction.

3. On June 17, 1963, petitioner filed a petition for rehearing (R. 550-559) in which he contended that the government had expressly repudiated the theory that he could have aided and abetted Janet Watkins when, upon Miss Watkins' withdrawal of her plea, it dismissed the indictment. He urged that he had a right to a new trial "at which his guilt could be evaluated in accordance with what the prosecution now says it believes." In addition petitioner contended that Miss Watkins, in testifying at trial that she did not intend to withdraw or change her plea of guilty, was falsely misrepresenting "her hopes and intentions concerning punishment," and that the prosecution "must have knowingly tolerated" such misrepresentations. He noted that the trial judge told the jury that it had accepted Miss Watkin's plea after careful questioning and that nonetheless the same court subsequently permitted her to withdraw her

plea. He asked, as an alternative to a reversal of his conviction, that the court order a full inquiry by a district judge, other than the trial judge, into the promises and assurances extended to Miss Watkins by government lawyers—a hearing at which witnesses and all correspondence between the United States Attorney and the Department of Justice be produced. Attached to the petition for rehearing was a motion for leave to file a supplemental record including the district court docket sheet and motions and orders relative to the withdrawal of the plea of guilty and the dismissal of the indictment as to Miss Watkins (R. 560-568).

In response to the petition for rehearing, the government offered the certificates of two counsel who represented Miss Watkins (R. 485, 598), of government counsel in charge of both prosecutions (R. 592), the affidavit of Miss Watkins (R. 596), and the request by the United States Attorney to the Justice Department for authorization to dismiss the indictment (R. 577, 582).

In their certificates, Miss Watkins' counsel represented in substance that from the beginning the girl had maintained that she neither placed the marihuana in her hair nor knew it was there; that, although they had explained matters of intent and knowledge to her, they nevertheless felt that she had never fully understood but had had the idea that she was guilty merely because the marihuana was in fact transported in her hair; that they had advised her that it was very unlikely that a jury would believe

her story that she did not know she carried the marihuana in her hair and that her best interests would be served by entering a plea of guilty to the lesser charge of the tax count, provided the government would accept the plea and consider dismissal of the smuggling count carrying a mandatory five-year sentence. They pointed out that at the time Miss Watkins pleaded guilty on September 25, 1961, she seemed reluctant to state that she knew the cigarettes were in her hair, but when she did finally state that she knew that fact, the judge accepted her plea. One of her attorneys, Mr. Rawitscher, said that before petitioner's first trial, set for December 5, 1961, he talked to the probation officer and gained the impression that both the probation officer and Judge Connally thought Miss Watkins was a victim of circumstances. Miss Watkins' counsel heard her testify at the first trial and found that the substance of her testimony was essentially the same as that in her discussions with counsel. Immediately after the first trial, both of her counsel talked with Judge Connally. Counsel felt the responsibility to move for a change of plea and to try the case without a jury if necessary but this was not discussed with Miss Watkins.* Counsel took no action before petitioner's second trial, which was held on February 6, 1962. Thereafter

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* The letter of November 19, 1961, from Mr. Rawitscher to co-counsel, Mr. Freed, which disclosed counsel's plan to move for withdrawal of the plea after petitioner's trial was specifically mentioned in the Certificate of Mr. Freed filed by the government on July 17, 1963 (R. 596, 601). This letter is set forth as Appendix E to the petition.

counsel moved for withdrawal of the guilty plea which was granted on April 23, 1962. The indictment was dismissed in June 1962.

The affidavit of Miss Watkins (R. 596) recited that her testimony at the trial that she had not undertaken to, and did not intend to, change her plea was true; that she had not talked to her lawyers at that time about such a course of action; that she was surprised to hear that the charges against her had been dismissed; that no promises had been given her for her testimony; and that neither her lawyers nor government counsel had asked her to testify in any particular way.

In his certificate (R. 592), government counsel stated that at the time of her arraignment he had not believed Miss Watkins' statement that she did not know the marihuana was in her hair; that he advised her counsel that she could enter a plea to the tax count and the government would dismiss the smuggling count; that he had subpoenaed Miss Watkins to testify at each of petitioner's trials; that he had made no bargains for her testimony and in fact was not asked to do so by anybody; that between the first and second trials he had had no contact with Miss Watkins or her counsel, Mr. Rawitscher, except in connection with the issuance of the subpoena; and that the events at the second trial, coupled with knowledge that she had plead guilty to the tax count on the advice of her attorneys, led him not to object to the motion to withdraw Miss Watkins' plea of guilty.

The recommendation of the United States Attorney to the Department of Justice (concurred in by the Bureau of Customs and the District Probation Officer and approved on June 20, 1962) recited that the girl's story that she had not known the marihuana was in her hair had not been believed at first by any investigator but that now government counsel was convinced of her innocence. It noted that she had maintained her story throughout; that she had entered the plea of guilty to the tax count (the lesser offense) on the advice of her counsel, who told her that no jury would believe her story; that at the time of her plea she had not readily admitted her guilt; and that the court was now convinced of her innocence and had granted a motion to permit her to withdraw her plea. It described her as "naive and not too intelligent."

On July 22, 1962, the court of appeals denied *per curiam* the motion for leave to file a supplemental record and the petition for rehearing (Pet. App. C).

ARGUMENT

In his petition for rehearing in the court below, petitioner alleged that matters which occurred after the trial of his case (and which therefore were not available at the time of his trial) tended to show that he had been denied a fair trial. The proper way to raise such allegations is by motion in the district court under Rule 33, F.R. Crim. P., for a new trial based on newly discovered evidence. Under Rule 33 petitioner did not need the permission of the court of

appeals to make such a motion in the district court even though the case was on appeal. Only if the district court, after due consideration, decided to grant the motion would it be necessary to obtain a remand of the cause from the court of appeals.

To be sure, the government, which had been accused of wrongdoing, undertook to answer petitioner's contentions and to supply information indicating that there had been no prosecutional misconduct and that petitioner was not denied a fair trial. The court of appeals, however, not only denied the petition for rehearing, but denied petitioner's motion to supplement the record. There is thus no indication that the court of appeals considered the merits; its action is entirely consistent with the view that it believed that the matters alleged should have been raised in the trial court in the first instance.

There is no basis for petitioner's complaint that the court of appeals should have ordered a hearing on his allegations.* It is for the district court on a motion directed to it to decide whether petitioner's allegations required a hearing and, if a hearing is deemed

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* Petitioner argues as if the prosecution had sought to convince the jury that Miss Watkins was guilty of unlawfully importing marihuana concealed in her hair. The fact is, however, that Miss Watkins did insist at the trial that she did not know that marihuana was in her hair; it was the defense which tried to establish that the witness was guilty on the theory, outlined in its opening statement, that her admission of guilt exculpated others. As to the claim that Miss Watkins was not telling the truth because she testified that she did not intend to withdraw her plea, the certificates of counsel show that they had not discussed with her their intention of making a motion to withdraw the plea

necessary, to resolve the factual issues and determine the legal effect of the facts found. Petitioner still has ample opportunity to make such a motion.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

HERBERT J. MILLER, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
JULIA T. COOPER,
Attorneys.

NOVEMBER 1963

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[1] The judgment of conviction was filed on March 13, 1962. A motion for a new trial may be made within two years after the final judgment. Rule 33, F.R. Crim. P.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1963 711524

Office-Supreme Court, U.S.
FILED
NOV 14 1963
JOHN F. DAVIS, CLERK

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UNITED STATES OF AMERICA, *Respondent*

On Petition For A Writ of Certiorari To The United States Court of Appeals For The Fifth Circuit

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REPLY TO THE BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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By suggesting that petitioner should seek relief through a motion for new trial filed under Criminal Rule 33, the government would relegate petitioner's future to discretionary review by the very judge whose silence created the questions presented in this appeal—a remedy which violates the spirit, if not the letter, of the statute providing, "No judge shall hear or determine an appeal from the decision of a case or issue tried by him." (28 U.S.C. 47).

> "To experienced lawyers it is commonplace that the outcome of a lawsuit—and hence the vindication of legal rights—depends more often on how the factfinder appraises the facts than on a disputed construction of a statute or interpretation of a line of precedents." *Speiser v. Randall*, 357 U.S. 513, 520.

Simple courtesy to the trial judge would alone seem to dictate that he not be compelled to act as factfinder when he himself is a witness. The motion for new trial is designed to apprise the judge of facts which he did not know at the time of trial, not to draw into question his own supervision of the proceedings.

The government does not deny that the facts are correctly stated in our petition. The government does not contend that these facts, in their present posture, do not entitle petitioner to relief. Nevertheless, the government would plunge him into a "merry-go-round" of post-trial motions (Cf. *Marino v. Ragen*, 332 U.S. 561, 570), none of which may prove reasonably effective to reach the problems posed by this particular record. If petitioner accepted the prosecution's invitation to proceed under Rule 33, it would be impossible to predict the future course of this litigation with almost mathematical precision.

Since the government withheld dismissal of the charge against Janet Watkins until long after expiration of the five-day period provided for filing of ordinary motions for new trial, petitioner has already been deprived of review which is "broader in scope" than that now available under Rule 33 (*Benton v. United States*, C.A.D.C., 1951, 188 F.2d 625, 627) and is put "under a heavier burden." (*Brodie v. United States*, C.A.D.C., 1961, 295 F.2d 157, 159.

The trial judge will have virtually non-reviewable discretion in determining whether he abused his discretion by failing to mention his conference with the prosecution's star witness. *Naval v. United States*, C.A. 9, 1960, 278 F.2d 611, 614-615; *United States v. Clancy*, C.A. 7, 1960, 276 F.2d 617, 637. Although his own off-the-record conduct of the trial would be subject to scrutiny at such a hearing, his fact-finding will be invulnerable (*United States v. Johnson*, 327 U.S. 106, 111) and the Fifth Circuit will even refuse to read either the records of trial or of the post-trial hearing. *Lyles v. United States*, C.A. 5, 1960, 279 F.2d 358, 359.

The prosecution may argue—or the trial judge may hold *sua sponte*—that the evidence he withheld from petitioner was "merely cumulative or impeaching" and thus provides no basis for relief under Rule 33. *Mesarosh v. United States*, 252 U.S. 1, 9. The judge may exercise his discretion by holding that the newly-discovered evidence of his conference with Janet Watkins does not, in his own mind, "compel judicial belief" that petitioner is innocent and that a jury will recognize his innocence by aquitting him. *Apel v. United States*, C.A. 8, 1957, 247 F.2d 277.

There is even some authority to the effect that newly-discovered proof of questionable conduct of the trial is not "newly discovered evidence as that term is traditionally understood by both Bench and Bar" for the purposes of Rule 33 motions. See *United States v. Holmes*, E.D.S.C., 1960, 183 F. Supp. 361, 365.

If, as we contend, there are constitutional questions in this case, petitioner might ultimately enjoy a remedy by motion under 28 USC 2255. Any discretionary fact-finding will be performed by the same trial judge, whose

opinions will stand in the Fifth Circuit unless "clearly erroneous" (*Shelton v. United States*, C.A. 5, 1957, 246 F.2d 571) and will be "entitled to the same right and respect on appeal as is any other facts determination which it is the court's duty to make." *Kennedy v. United States*, C.A. 5, 1957, 249 F.2d 257, 258.

Some years from now, if he can prove that other modes of collateral attack have been exhausted as required by the last paragraph of 28 USC 2255, petitioner may finally secure review in another court by testing his detention through habeas corpus in the district where he is confined. He will have been confined long enough to insure that he must proceed under all of the hardships and delay attendant to pauper's applications. If his sentence has been served, habeas corpus will not lie. *Parker v. Ellis*, 362 U.S. 574.

Less than a month ago, this court noted its "broad powers of supervision" over federal proceedings and stated, "It is more appropriate, whenever possible, to correct errors reachable by the appeal rather than remit the parties to a new collateral proceeding." *Bartone v. United States*, No. 337, O. T. 1963, decided October 28, 1963.

The errors in this case can be reached through this appeal; they should be corrected before this conviction becomes final and petitioner must pursue his remedies from a prison cell.

Respectfully submitted,

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Counsel for Petitioner

CERTIFICATE OF SERVICE

I certify that five copies of the above and foregoing brief were mailed to the Solicitor General, Department of Justice, Washington 25, D.C., air mail postage prepaid, this 13th day of November, 1963.

WILLIAM F. WALSH, Esq.

Office-Supreme Court, U.S.
FILED
JAN 27 1964
JOHN F. DAVIS, CLERK

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PETITION FOR REHEARING OF THE ORDER DENYING A WRIT OF CERTIORARI

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PETITION FOR REHEARING OF THE ORDER DENYING A WRIT OF CERTIORARI

Additional Question Presented

Whether a United States District Judge who has personal knowledge of critical information bearing on the credibility of a key prosecution witness in a criminal case retains jurisdiction to preside in spite of the mandatory provision of 28 *U.S.C.* 455 that, "Any . . . judge of the United States shall disqualify himself in any case in which he . . . is or has been a material witness . . ."

Additional Reasons for Granting the Writ

1. Section 455, Title 28, *United States Code*, provides:

> "Any . . . judge of the United States shall disqualify himself in any case in which he . . . is or has been a material witness . . ."

2. When a judge falls within the provisions of this statute, he has no discretion to continue to preside. He has a mandatory duty to withdraw from the case. "The word 'shall' is ordinarily 'the language of command'" *(Anderson v. Yungkau*, 329 U.S. 482, 485) imposing a mandatory duty when the ends and aims to be achieved affect fundamental rights *(Escoe v. Zerbst*, 295 U.S. 490, 493). The words "shall be allowed" mean ". . . 'must be allowed' when asked for by one who stands in such relation to the cause that he can demand it." *(Ex Parte Jordan*, 94 U.S. 248, 251). " 'Shall' ought undoubtedly be construed as meaning 'must' for the purpose of sustaining or enforcing an existing right . . ." *(West Wisconsin R. Co. v. Foley*, 94 U.S. 100, 103).

3. Since the tenor of her conversations with the district judge would have borne on her credibility, the judge became a material witness himself. As Judge Medina told one jury:

> "A material fact includes a fact bearing on the credibility of the witness, as well as those bearing directly on the issues in this case." *United States v. Foster*, 9 F.R.D. 367, 389.

4. Jurisdiction is "lost in the course of the proceedings" *(Frank v. Mangum*, 237 U.S. 309, 327; *Johnson v. Zerbst*,

304 U.S. 458, 468) if fundamental considerations of fairness are ignored.

Twice, this Court has found it necessary to reverse criminal convictions because cross-examination about clemency expectations was curtailed (*Alford v. United States*, 282 U.S. 687; *Gordon v. United States*, 344 U.S. 414). It is child's play to eradicate these opinions if the prospects the witness expects to enjoy may be concealed from the cross-examiner.

The jury's power to evaluate a witness fairly is destroyed if a judge may assure the jury that he has tested the merits of a plea of guilty (R. 484), even though the judge knows that the witness is actively campaigning to secure her freedom by maintaining her innocence (after careful "explanations" by her lawyers concerning "intent and knowledge"—R. 584-585, 598-599). We respectfully contend that when the trial judge's private knowledge of his own conference with the prosecution's "star witness" became material during the course of this trial, he had a duty to tender himself to the defense as a witness and to disqualify himself from further control over the proceedings—that he was without jurisdiction to proceed as a judge.

We feel that we do not exaggerate when we say that this case raises crucial issues in the administration of justice. In the very nature of things, certain facts will be known only to the trial judge, as when he confers privately with a key witness. Section 455 of the Judicial Code is designed to protect the parties by placing the burden on the judge to disclose his prior information and to disqualify himself.

Certainly that burden is not satisfied when:

1) a witness pleads guilty in public; and

(2) then privately meets with the judge to assert her innocence;

(3) when the meeting leads the judge to approve dismissal of all charges against the witness; but when the judge, nevertheless,

(4) assures that jury that he satisfied himself the guilty plea was justified (R. 484) and then, as part of his formal instructions to the jury, lends the weight of his office to the theory that, "It might well be that both the Defendant Beck and Miss Watkins knew about the marijuana in her hair . . ."*

(5) just before dismissing the case against Miss Watkins, on the footing that Miss Watkins did **not** know the marijuana was in her hair.

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be granted as to the questions presented both in the original petition and in this petition for rehearing.

Respectfully submitted,

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Attorney for Petitioner

*This quotation from the charge to the jury appears at about the middle of the judge's instructions. We have a copy of the charge, but the page numbers do not match the pagination of the record. The Clerk is prohibited from loaning the record to us at this stage of the proceedings.

Certificate of Good Faith

I certify that this petition for rehearing is presented in good faith and not for delay, and that it is restricted to a substantial ground available to Petitioner and not previously presented.

WILLIAM F. WALSH

Certificate of Service

I certify that five copies of this Petition were mailed to the Solicitor General, Department of Justice, Washington 25, D.C., air mail postage prepaid, this 24th day of January, 1964.

WILLIAM F. WALSH